

STATE OF MICHIGAN
COURT OF APPEALS

JOAN KORSON, as Personal Representative of the
Estate of WILLARD M. KORSON, Deceased, and
SUSAN BOERSMA,

UNPUBLISHED
December 3, 1999

Plaintiffs-Appellees,

and

ELDA CAPARSO,

Intervening Plaintiff-Appellee,

v

BLUE CROSS & BLUE SHIELD OF MICHIGAN,

Defendant-Appellant.

No. 207253
Wayne Circuit Court
LC No. 95-505054 NZ

Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant Blue Cross & Blue Shield of Michigan (BCBSM) appeals as of right from an order approving settlement and dismissing a class action suit against it. On appeal, defendant challenges an earlier circuit court order allowing intervening plaintiff, Elda Caparso, to intervene into the class action. We reverse.

Caparso was diagnosed with breast cancer in February 1991. After undergoing surgery and chemotherapy, she was informed by her doctors that high dose chemotherapy and a bone marrow transplant were medically necessary to fight the disease. Just prior to the beginning of this treatment, defendant informed her that it would not pay for the treatment. Caparso went ahead with the recommended treatment and filed suit against defendant on February 25, 1994, claiming, among other things, that defendant's failure to cover the high dose chemotherapy and bone marrow transplant was a breach of its contract with her. On January 5, 1995, the trial court granted defendant's motion for summary disposition and dismissed Caparso's suit, finding that under riders to her contract with

defendant, the medical treatments for which she claimed defendant was required to pay were excluded from coverage. On January 23, 1995, Caparso filed an appeal as of right from the trial court's grant of summary disposition. On February 8, 1996, this Court dismissed her appeal for failure to file a brief.

In the meantime, on February 22, 1995, plaintiffs Willard M. Korson and Joan Korson filed suit against defendant, among others,¹ seeking declaratory and injunctive relief. Plaintiffs specifically requested that the trial court find that two of defendant's riders, Rider GLE-1 and BMT, which excluded coverage of bone marrow transplants and high dose chemotherapy, violated contractual and statutory provisions. Plaintiffs subsequently filed a motion to amend their complaint so that several actions then pending could be consolidated into a class action. The trial court granted plaintiffs' motion to certify a class and defined it in the following manner:

[A]ll cancer patients who are ERISA or non-ERISA BCBSM subscribers who have requested and been denied authorization for - - or who ever will request and be denied authorization for - - high dose chemotherapy, accompanied either by bone marrow transplant or stem cell rescue, on the basis of Rider BMT, Rider GLE-1, or a representation by BCBSM that the treatment sought was "experimental" or "investigational in nature." This class of persons shall constitute the plaintiff class in this lawsuit, with the exception of those non-ERISA group subscribers who requested and were denied authorization for high dose chemotherapy with autologous bone marrow transplantation for breast cancer prior to October 5, 1992 and who did not exclude themselves from the class action brought in Spencer v. BCBSM, docket number 91-114487 CK.

However, no class notice was approved by the trial court or sent at that time. After numerous motions on various other issues, the trial court eventually entered an order recertifying the class action and approving the notice for the class members. In this order, the trial court defined class members in the following manner:

[A]ll cancer patients who were members or estates of member non-ERISA certificates underwritten by Blue Cross and Blue Shield of Michigan (BCBSM) for whom a request was made to BCBSM for high dose chemotherapy with bone marrow transplantation or peripheral stem cell rescue at the request of a physician from October 5, 1992 to the present and continuing until further Order of this court, and whose request was denied by BCBSM from October 5, 1992 to the present and continuing until further Order of this court. *The class shall not contain any persons or estates who have litigated a prior lawsuit against BCBSM over denial of this coverage to final settlement of judgment.* The class shall also include similarly situated Plaintiffs who have filed lawsuits over denial of this coverage which have been pending in Wayne County Circuit Court for over 30 days.

A few days before the class action settlement agreement was reached, Caparso filed an emergency motion to intervene as a member of the class. The trial court granted the motion and

subsequently entered an order approving the settlement of the class action and dismissing the case. The trial court's order expressly stated that Caparso was entitled to the benefits of the settlement agreement.

Defendant first argues on appeal that the trial court erred when it allowed Caparso to intervene because she was barred from the class action under the doctrine of res judicata. We agree. The doctrine of res judicata bars relitigation of a claim where the same parties fully litigated a claim and a final judgment has resulted. *Andrews v Donnelly (After Remand)*, 220 Mich App 206, 209; 559 NW2d 68 (1996). Moreover, res judicata bars litigation in a subsequent action not only of those claims actually litigated in the first action, but also claims arising out of the same transaction which the parties, exercising reasonable diligence, could have litigated, but did not. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 396; 573 NW2d 336 (1997). Res judicata applies when (1) the first action was decided on its merits, (2) the matter being litigated in the second case was or could have been resolved in the first case, and (3) both actions involved the same parties or their privies. *Phinisee v Rogers*, 229 Mich App 547, 551; 582 NW2d 852 (1998). The application of the doctrine of res judicata is a question of law, which this Court reviews de novo. *Id.*

Here, the trial court interpreted the contract between defendant and Caparso, concluded that under riders to that contract, the medical treatments for which she claimed defendant was required to pay were excluded from coverage, and dismissed the case with prejudice. Clearly, the court resolved the first action on the merits. The same issue, whether high dose chemotherapy and bone marrow transplant for breast cancer is a covered benefit, was resolved in both cases. Finally, the same parties, Caparso and BCBSM, were involved in both suits. Accordingly, the doctrine of res judicata applies to bar Caparso's intervention into the class action.

Caparso argues, however, that application of res judicata in this instance will produce an inequitable result because she will have to pay for treatments that others will receive as a benefit under the same contract with defendant. We note, however, that Caparso had recourse from the trial court's ruling in the form of an appeal. Unfortunately, no brief was filed and her appeal was dismissed. Under these circumstances, we find no inequity in application of the doctrine of res judicata.

Because we conclude that the doctrine of res judicata barred Caparso from intervening into the class action, we need not review defendant's claim that her intervention was barred by the language of the order recertifying the class.

The trial court's order allowing Caparso to intervene is reversed.

/s/ Jeffrey G. Collins
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

¹ Plaintiffs also filed suit against the Commissioner of Insurance, the Insurance Bureau, and the Department of Commerce. Those actions subsequently were dismissed by a stipulated order.